

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>GREGORY DUNBAR</b>	<b>:</b>	<b>CIVIL ACTION</b>
<b>v.</b>	<b>:</b>	
<b>GERALD ROZUM</b>	<b>:</b>	<b>NO. 07-cv-5425</b>

**MEMORANDUM AND ORDER**

The Antiterrorism and Effective Death Penalty Act of 1996 (commonly known as “AEDPA,” and codified as 28 U.S.C. §§2241-2266) deals with the right of all persons in state custody, or in federal custody, to file a petition in a federal court seeking the issuance of a writ of habeas corpus. In the context of a prisoner in state custody, if such a writ of habeas corpus is issued by a federal court, the prisoner will be released from state custody on the grounds that certain rights accruing to that prisoner pursuant to the United States Constitution<sup>1</sup> have been violated; habeas corpus motions pursuant to AEDPA are the **only** possible means of obtaining this type of relief from state custody. Benchoff v. Colleran, 404 F.3d 812 (3<sup>rd</sup> Cir. 2005); Coady v. Vaughn, 251 F.3d 480 (3<sup>rd</sup> Cir. 2001).

In cases involving prisoners in state custody, AEDPA, if it applies at all, provides for relief by means of 28 U.S.C. §2254 (in some factual situations), or by means of 28 U.S.C. §2241 (in other factual situations). Relief pursuant to 28 U.S.C. §2254 for a petitioner who is in state custody is limited by the terms of 28 U.S.C. §2254 itself to a

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<sup>1</sup>For the purpose of brevity, we will use the term “Constitutional” to refer not only to attacks based on alleged violations of the U.S. Constitution, but also to attacks based on any asserted federal collateral grounds for relief from custody, such as alleged violations of federal statutes and treaties involving the United States, or an alleged lack of jurisdiction by the sentencing court. Gonzalez v. Crosby, 545 U.S. 524 (2005).

constitutional<sup>2</sup> attack on the imposition, and/or the execution,<sup>3</sup> of a state conviction and/or a state sentence, which may only be filed after the state conviction has been imposed.<sup>4</sup>

Because in federal jurisprudence, a more specific statute takes precedence over a more general statute, and because §2254 is more specific than §2241, a state prisoner may only rely on §2241 if the matter does not fall under §2254.<sup>5</sup> A grant of relief pursuant to 28 U.S.C. §2241 in cases involving state custody is therefore limited to an attack on state custody that is constitutional in nature, and that is made before the imposition of the state conviction.

On December 21, 2007, petitioner filed a petition in this court, labeled 07-cv-5425 by the Clerk of this Court, seeking Habeas Corpus relief. In this petition, he raises a claim that allegedly justifies such relief, namely that as a result of fraud upon the court, petitioner's due process rights have been violated.

This is clearly a claim that the rights guaranteed to petitioner pursuant to the Fifth and Fourteenth Amendments to the United States Constitution have been violated.

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<sup>2</sup>Where there is an attack on state custody which does not involve a Constitutional argument, there is no right to habeas corpus relief, and, assuming that petitioner's appeals in state court are exhausted, the proper remedy lies in filing a petition with the state's Governor seeking executive clemency. Herrera v. Collins, 506 F.3d 390 (1993). Although Herrera is a pre-AEDPA case, it remains valid law after the enactment of AEDPA. Ruiz v. USA, 221 F.Supp. 2d 66 (D.Mass. 2002), aff'd, 339 F.3d 39 (1<sup>st</sup> Cir. 2003).

<sup>3</sup>Coady v. Vaughn, 251 F.3d 480 (3<sup>rd</sup> Cir. 2001).

<sup>4</sup>Benchoff v. Colleran, 404 F.3d 812 (3<sup>rd</sup> Cir. 2005); Coady v. Vaughn, 251 F.3d 480 (3<sup>rd</sup> Cir. 2001).

<sup>5</sup>Coady v. Vaughn, 251 F.3d 480 (3<sup>rd</sup> Cir. 2001).

This petition seeks the type of relief that is only available pursuant to 28 U.S.C. §2254. Benchoff v. Colleran, 404 F.3d 812 (3<sup>rd</sup> Cir. 2005); Coady v. Vaughn, 251 F.3d 480 (3<sup>rd</sup> Cir. 2001).

We note that by means of AEDPA, Congress created a series of ***intentionally restrictive gate-keeping conditions*** which must be satisfied for a prisoner to prevail in his petition seeking the issuance of a writ of habeas corpus pursuant to 28 U.S.C. §2254.<sup>6</sup> One such intentionally restrictive gate-keeping condition is AEDPA's ***“second or successive rule,”*** created by 28 U.S.C. §2244(b), which generally forbids a litigant from filing a §2254 habeas if that litigant had at least one previous §2254 habeas that was “dismissed after adjudication of the merits of the claims presented,”<sup>7</sup> which means:

- I. a dismissal after a consideration on the merits;<sup>8</sup> or,
- II. a dismissal on the grounds of the statute of limitations;<sup>9</sup> or,
- III. a dismissal on grounds of procedural default.<sup>10</sup>

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<sup>6</sup>The strict AEDPA gate-keeping procedures were enacted by Congress in order to support the policy of creating finality with respect to state and federal criminal prosecutions. Woodford v. Garceau, 538 U.S. 202 (2003); Duncan v. Walker, 533 U.S. 167 (2001); Crews v. Horn, 360 F.3d 146 (3<sup>rd</sup> Cir. 2004).

<sup>7</sup>Stewart v. Martinez-Villareal, 523 U.S. 637 (1998).

<sup>8</sup>Dunn v. Singletary, 168 F.3d 440 (11<sup>th</sup> Cir. 1999).

<sup>9</sup>Duncan v. Walker, 533 U.S. 167 (2001).

<sup>10</sup>In re Cook, 215 F.3d 606 (6<sup>th</sup> Cir. 2000). (A 28 U.S.C. §2254 case is found to be Procedurally Defaulted where the petitioner in such a §2254 case previously had the right to file an appeal of the state conviction and/or sentence involved to a state appellate court but the petitioner did not, in fact, file such an appeal, and some procedural rule of the state court system dictates that the time has passed for such a state filing. This principle is based on the concept that the states are free to impose

Petitioner has filed four previous petitions in this court seeking Habeas Corpus relief pursuant to 28 U.S.C. §2254. The first petition, 91-cv-3605, was dismissed for failure to exhaust state court remedies. The second petition, 95-cv-3610, raised three claims, one of which was dismissed as frivolous. The third and fourth petitions, 98-cv-0018 and 98-cv-3413, respectively, were both dismissed as they triggered the second or successive rule. In such circumstances, pursuant to AEDPA's second or successive rule, before a second or successive 28 U.S.C. §2254 petition is filed in the district court, the prisoner must first get permission to so file from the circuit court; without such circuit permission, the district court lacks subject matter jurisdiction to consider such a habeas petition. Benchoff v. Colleran, 404 F.3d 812 (3d Cir. 2005).

However, petitioner in the instant matter purports to seek habeas corpus relief pursuant to 28 U.S.C. §2241 (and not pursuant to 28 U.S.C. §2254). This is a crucial distinction, as the second or successive rule of AEDPA does not apply to 28 U.S.C. §2241 petitions. Zayas v. INS, 311 F.3d 247 (3<sup>rd</sup> Cir. 2002). Accord, Jacobs v. McCaughtry, 251 F.3d 596 (7<sup>th</sup> Cir. 2001); Chambers v. USA, 106 F.3d 472 (2<sup>nd</sup> Cir. 1997). The fact that relief pursuant to 28 U.S.C. §2254 may possibly be barred pursuant to AEDPA's second or successive rule does not mean that an alternate route to this type of relief is available pursuant to 28 U.S.C. §2241.

Pursuant to Mason v. Meyers, 208 F.3d 414 (3d Cir. 2000), this court may not re-characterize such a document as a 28 U.S.C. §2254 petition without first:

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procedural bars designed to restrict repeated attempts to re-litigate matters in state appellate courts. Slack v. McDaniel, 529 U.S. 473 (2000)).

1. notifying the petitioner that the court believes it is really a §2254 petition purporting to be something else; **and**,
2. warning the petitioner of all of the ramifications of AEDPA (including, but not limited to, the AEDPA statute of limitations, as well as the second or successive rule created by AEDPA); **and**,
3. getting permission from the prisoner to re-characterize the petition as a 28 U.S.C. §2254 petition; **and**,
4. informing the petitioner that he also has the option to voluntarily withdraw his submission.

Assuming that petitioner consents to the aforesaid recharacterization, then pursuant to Local Civil Rule 9.3(b), and Rule 2 of the Rules Governing 28 U.S.C. §2254 Proceedings in the United States District Courts, this petition was not filed with the requisite current standard 28 U.S.C. §2254 form, prescribed by this court, effective December 1, 2004. Aside from the dictate of the aforesaid rules of court, use of this court's current standard form in 28 U.S.C. §2254 habeas cases is necessary so as to guarantee that the defendant is made aware of the specific warnings required from this district court at the commencement of any 28 U.S.C. §2254 habeas case pursuant to USA v. Thomas, 221 F.3d 430 (3rd Cir. 2000) (which relates to the strict and short statute of limitations that exists for filing a 28 U.S.C. §2254 petition); and Mason v. Meyers, 208 F.3d 414 (3<sup>rd</sup> Cir. 2000) (which relates to the strict restrictions on filing a second or successive 28 U.S.C. §2254 petition) (these specific Thomas and Mason warnings are contained in the introductory text of this court's aforesaid current standard §2254 form). Whereas all district courts within the Third Circuit are required to give petitioners in §2254 cases these Thomas and Mason warnings at the time of filing, this court cannot "waive" the form requirements of Local Civil Rule 9.3(b).

Accordingly, this

Day of January, 2008, it

is hereby **ORDERED** as follows:

1. The Clerk of Court shall furnish petitioner with a blank copy of this court's current standard form for filing a petition pursuant to 28 U.S.C. §2254 (bearing the above-captioned civil action number).
2. Petitioner shall notify this court within thirty (30) days whether he consents to the reclassification of 07-cv-5425 as a 28 U.S.C. §2254 petition, and, that if he does consent to such reclassification, he shall complete the enclosed 28 U.S.C. §2254 form and return it to this court.
3. Petitioner is formally placed on notice that if he insists that 07-cv-5425 proceed as a 28 U.S.C. §2241 petition, that 07-cv-5425 shall be dismissed without prejudice for seeking relief that is not available pursuant to 28 U.S.C. §2241.
4. Petitioner is formally placed on notice that if he does not respond to this Order within thirty (30) days, that 07-cv-5425 shall be dismissed without prejudice for seeking relief that is not available pursuant to 28 U.S.C. §2241.

**s/ ROBERT F. KELLY**  
**ROBERT F. KELLY, U.S. District Judge**